No. 05-20

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NANCY WATSON, beneficiary on a life insurance policy issued to JAMIE WATSON,

Petitioner,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Jamie Watson died as the result of injuries sustained in a single-car collision on June 9, 2000 in Ware Shoals, South Carolina. At the time of his death he had a blood alcohol level of .175%. Mr. Watson was an employee of Lowe's Companies which had established an ERISA governed group accidental death and dismemberment plan that was fully insured by Unum Life Insurance Company of America ("Unum"). Mr. Watson designated his grandmother, Nancy Watson, as his sole beneficiary and pursuant thereto, she made a claim for benefits.

The plan at issue granted Unum discretionary authority to determine eligibility for benefits and interpret the terms of the plan. After three reviews, the claim for benefits was denied by Unum on the grounds that Mr. Watson "did not sustain an 'Injury' that resulted in a covered loss as defined in the Policy." Unum concluded that Mr. Watson's action of driving while under the influence of alcohol at a blood alcohol level of .175% caused, contributed to, or resulted in his death and that his death was not an accident which was covered by the policy.

Nancy Watson sought a review of Unum's decision by the United States District Court in South Carolina. The district court held that Unum did not abuse its discretion in denying the claimed benefits and upon appeal, the Fourth Circuit Court of Appeals affirmed the district court in an unpublished opinion.

The Petitioner has presented a question for review that has only a tangential relationship to this case. The Petitioner is asking this Court under the federal common law under ERISA to define and set forth the term "accident" as it is "commonly understood." This question presented does not present a novel issue or a split in circuit court decisions. Accordingly, the Court should not grant certiorari on this question.

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29 U.S.C. § 1001, *et seq.* 1

OPINION AND JUDGMENT BELOW

This matter involves a claim for benefits under an insurance plan covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq*. This matter came before the District Court for a bench trial on January 7, 2003. After consideration of the parties' memoranda, arguments of counsel, the administrative record and the applicable law, on January 31, 2003, the District Court rendered findings of fact and conclusions of law and entered judgment for UNUM Life Insurance Company of America. Watson filed her Notice of Appeal on February 27, 2003. In an unpublished opinion dated March 22, 2005, The Fourth Circuit Court of Appeals affirmed the District Court's ruling that Watson's death was not the result of an "injury" as defined under the policy.

ERRORS AND OMISSIONS IN PETITIONER'S STATEMENT OF THE CASE

Petitioner includes an abbreviated version of the facts within her argument and her Statement of the Case. However, Petitioner misstates certain facts and omits others that are important to the Court's decision.

Petitioner incorrectly states that "after suit was filed, Unum abandoned its original position and denied coverage solely on the ground that Mr. Watson did not have an accident as defined by their policy." Brief of Petitioner at i. However, this statement is simply incorrect in that Unum clearly denied Watson's claim during the claims process and not after the lawsuit was filed. App. at 10a.

Petitioner omits that the plan at issue gave Unum discretionary authority to determine eligibility for benefits and to interpret the terms and provisions of the plan. App. at 14a.

Petitioner also omits the actual language of the contract term at issue, which states: "Injury means bodily injury that is the direct result of an accident and not related to any other cause." App. at 5a.

Finally, Petitioner omits that the South Carolina Uniform Traffic Collision Report filled out by investigating officers of the South Carolina Department of Public Safety stated:

> Unit 1 was traveling north on Sec. 38, Driver of Unit 1 driving at a high rate of speed lost control of the vehicle and ran off right side of the roadway striking a ditch which caused the vehicle to overturn and strike two trees.

App. at 6a.

The Uniform Traffic Collision Report indicated that Jamie Watson's estimated speed was 75 mph in a 35 mph zone, the weather was clear, there were no adverse conditions, the collision occurred in a residential area on a level curve, there were no defects in the road or the vehicle, there were no vision obstructions, and that Jamie Watson contributed to the collision. App. at 7a.

REASONS FOR DENYING THE PETITION

Petitioner begins the argument contending that there is "confusion" among the "various circuits of this country" when applying the federal common law under ERISA with regard to the definition of an "accident." Brief of Petitioner at p. 5. Yet, four pages later, Petitioner admits that "while most courts that have addressed the issue of what is an accident claim to have applied the *Wickman v. Northwestern National Insurance Company*, 908 F.2d 1077 (1st Cir.), *cert. denied*, 498 U.S. 1013, 112 L. Ed. 2d 586, 111 S. Ct. 581 (1990) test, they have applied it inconsistently." *Id.* at p. 9.

Thus, there is no "confusion" between the circuits as to what test to apply. Petitioner subsequently contends that the circuits are applying the test "inconsistently." But, Petitioner's argument fails in that the circuits draw a distinction with respect to the type of activity in which one is engaged. Regardless of the actual language used, the analysis is the same and the results are uniform. Under the present federal common law under ERISA, drivers cannot reasonably expect to have their injury or death characterized as "accidental" when they drive drunk in violation of state law.

Additionally, Petitioner fails to point out that the *Wickman* decision is cited by Petitioner's leading case as being the cause of the uniformity of results in cases involving intoxicated drivers and the definition of an "accident." As a result, the Petitioner complains of uniform results from the application of the same test. The Petitioner then cites to a ruling, which has been vacated. *King v. Hartford Accident Insurance Co.*, 357 F.3d 840 (8th Cir. 2004), *vacated and rehearing en banc granted*, 2004 U.S. App. LEXIS 6503

(April 6, 2004). The *King* decision also leaves in doubt the *West* decision upon which it relied for statistics and related arguments. Accordingly, the petition should be denied.

ARGUMENT

I. WHEN DEATH IS THE RESULT OF AN INSURED DRIVING WHILE INTOXICATED IT IS NOT ACCIDENTAL.

The Petitioner contends that this Court should review this case to resolve a conflict in some of the decisions of the circuit courts of appeal about intoxicated drivers and whether their self inflicted deaths should be considered accidents. However, this conflict is more imagined than real. The conflict, if one can be said to exist, "is between the federal courts on one hand and state courts on the other." *Cranfill v. Aetna Life Insurance Company,* 2002 OK 26, 49 P.3d 703, 707 (2002). In fact, a case cited and quoted extensively by the Petitioner, *West v. Aetna Life Insurance Company*, 171 F. Supp.2d 856 (N.D. Ia. 2001), made the following observation about *Wickman v. Northwestern National Insurance Company*, 908 F.2d 1077 (1st Cir.), *cert. denied*, 498 U.S. 1013, 112 L. Ed. 2d 586, 111 S. Ct. 581 (1990) when it stated as follows:

> The *Wickman* decision is important for a number of reasons here, but most importantly for the near uniformity with which courts in ERISA cases involving intoxicated drivers have since relied on *Wickman* to reject the "accidental means" test as a definition of "accident" and have instead embraced the *Wickman* definition of "accident. . . ."

* * * *

> Thus, the court finds that *Wickman* may be treated as a statement of federal common law for the definition of "accident" under an ERISA plan in which the term is not unambiguously defined. *Id.* at 884-86.

A. *The Wickman Decision*

Courts have struggled with various means to define and understand the term "accident", particularly as it applies to life and accident insurance. Justice Cardozo became a part of the legal lore by employing the expression "Serbonian bog" when referring to an oft-employed distinction between accidental means and accidental results. *Landress v. Phoenix Mutual Life Insurance Company*, 291 U.S. 491, 499, 54 S. Ct. 461, 463, 78 L. Ed. 934, 938 (1934).

When it came to the formation of a standard adopted by the federal court system in ERISA cases, the court in *Wickman* appears to have succeeded. *See* the court's comment in *West*, noting that Wickman may be treated as a statement of federal common law for the definition of "accident" under ERISA. . . . 171 F. Supp.2d at 886. However, Petitioner misunderstands *Wickman*.

The Petitioner refers to expressions such as "highly likely" as being a matter of "probability". Brief of Petitioner at pages 6-7. In fact, an attempt is made to imply that statistically a death must be more (very) probable than not for the result to be other than accidental. Petitioner attempts to bolster this approach by the use of drunken driving statistics which establish (for the year 2000) that a person is

more likely to be arrested for drunk driving than to die of drunk driving. *Id.* at note 1 page 7.

However, this is a fallacious argument in the face of *Wickman* which Petitioner so heartily advocates. In *Wickman* the court noted that people who engage in games of Russian roulette do not expect or intend to be killed.[1] Yet the courts uniformly refuse to call the death accidental, regardless of insured's actual expectation or intention. *Wickman* at 1087. Similarly, when people play games like Russian roulette, their deaths are not regarded as accidental. *Id.*

Thus, an insured who understands the odds and has no intention or reasonable expectation (statistically) of causing his own death but who dies playing Russian roulette, does not, as far as the courts are concerned, die by accidental means. It may be that society has evolved to a point where some behavior is so disfavored and frowned upon that one who engages in the activity is afforded far less protection than other riskier but more acceptable behavior.[2]

The Petitioner is proposing an idea that was rejected in *Wickman*—the concept that unless the intoxicated driver actually expected to die, or unless it can be shown that he was statistically at a very high risk of dying such that the probability of his death could not be ignored by a reasonable man, his death must be classified as an accident. Aside from

[1] In fact, if using a six shot revolver, the odds are very strongly in favor of the player *not* being shot (less than 17%).

[2] The district court in *West* notes that *Wickman* is important for a number of reasons, "but most particularly for the near uniformity with which courts in ERISA cases" reject an accidental means test with cases involving intoxicated drivers. 171 F.Supp.2d at 884.

the reasons given in *Wickman* which make such a test inappropriate, the Petitioner ignores the danger to innocent third parties created solely by the actions of intoxicated drivers. While to place oneself in peril is one thing, but how could any reasonable person subject multitudes of innocent third parties to such exposure?[3]

What *Wickman* also pointed out is that it is not any major formula or words which determine whether a death is "accidental." It is not the difference between "should have known" or "substantially likely to occur" or "highly like to occur" or "that a reasonable person in his shoes would have expected the result and that any other expectation would be unreasonable" but it is something in addition to those criteria.

The *Wickman* court found that the deceased either "subjectively expected serious injury or the evidence was inconclusive as to his subjective expectation." However, objectively "he reasonably should have expected serious injury when he climbed over the guardrail" and suspended himself with only one hand. 908 F.2d at 1089. Similarly, it is common for a majority of federal courts to find a "death which is the natural and probable consequence of an act or course of action is not an accident nor is it produced by accidental means, and if not the result of actual design [the] insured must be held to have intended the result." *Baker v. Provident Life & Accident Insurance Company*, 171 F.3d 939, 942 (4th Cir. 1999).

Thus, the courts applying federal common law under ERISA draw a distinction with respect to the type of activity

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[3] Pointing a revolver with less than a 17% chance of firing at a totally innocent and random third person and pulling the trigger would earn the perpetrator a lengthy prison sentence despite the actual odds of death.

in which one is engaged. Regardless of the actual language used, the analysis is the same and the results are uniform. Under the present common law, drivers cannot reasonably expect to have their injury or death characterized as "accidental" when they drive drunk in violation of state law.[4]

The circuits are and have all been relatively consistent in their result. They have all decreed that they will not regard the infliction of death or injury on an intoxicated driver as an accidental event for insurance purposes. The courts will not permit the intoxicated driver to benefit at the expense of the other contributors to the fund.[5]

II. THE FOURTH CIRCUIT'S RULING WAS CONSISTENT WITH FEDERAL COMMON LAW UNDER ERISA.

The Petitioner also contends that the Fourth Circuit Court of Appeals has taken "inconsistent positions". In support of this argument, *Metropolitian Life Insurance Company v. Henkel*, 234 F.2d 69 (4th Cir. 1956) is cited. However,

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[4] Virtually all the cases refer to the insured's alcohol content when discussing the facts of the case. It could also be argued that the most intoxicated person would be the least likely to recognize the consequences of their actions (in operating a vehicle) and thus should be the most immune from having their actions characterized as intentional.

[5] Interestingly, the *Wickman* court found the starting point is the reasonable expectation of the insured at the time the policy was purchased. 902 F.2d at 1088. There are no statistics about how many persons would check the "yes" box if asked if they expected the insurance to cover them if they decided to voluntarily drive drunk and cause a death at the time the policy was issued.

Metropolitan was a pre-ERISA case that applied the law of North Carolina which distinguished between "accidental means" and "accidental results".

Petitioner complains that in her case the Fourth Circuit Court of Appeals "failed to explain why the contract interpretation in those cases was not applicable in this case. "Brief of Petitioner at p. 11. This explanation should not have been necessary. The *Wickman* case specifically addressed this issue and noted that the test employed was "artificial and confusing" and concluded the matter by stating "[t]hus, we elect to pursue a path for the federal common law which safety circumvents the 'Serbonian Bog.'" 908 F.2d at 1086.

Similarly, the Petitioner alleges that the "reasonably foreseeable standard" did not apply in *Patch v. Metropolitan Life Insurance Company*, 733 F.2d 302 (4th Cir. 1984). Brief of Petitioner at 10. The Petitioner is completely mistaken. The *Patch* case was whether an overdose of heroin resulted in an "accidental" death. The Fourth Circuit applied the "reasonably foreseeable" standard when it found the deceased to have "deliberately exposed himself to a substantial and foreseeable risk of serious injury or death, even if death is neither intended nor certain to result." *Id.* at 304.[6]

Finally, Petitioner cites *Zurich General Accident & Liability Insurance Co. v. Flickinger*, 33 F.2d 853 (4th Cir.

[6] This case was decided under Virginia law but it may be noted that the court likened heroin use to playing Russian roulette and noted that for one who engaged in such activity, "fully aware of the manifold risks involved", death was a natural and probable consequence of his knowing actions "and was therefore not accidental. 733 F.2d at 304.

1929) for the proposition that a reasonably foreseeable standard did not apply. In *Zurich General*, the 1929 Court used "unforeseen, unexpected and unusual" instead. The issue was the poisoning of the decedent from consuming a drink with wood alcohol—something which he did not know it contained nor, in fact, did the person who gave him the drink. As the court said: "There would seem to be no room for argument that under this definition a death which results from unintentionally drinking wood alcohol while supposedly drinking an ordinary gin cocktail is death from accidental means." *Id.* at 855.[7]

Petitioner attempts to create inconsistency by relying on Fourth Circuit diversity cases. However, because these cases utilize state law, they have no application to the present case. The Fourth Circuit has not been inconsistent in applying the federal common law under ERISA.

CONCLUSION

The circuit courts of appeal are very consistent in their holding that an unlawfully intoxicated driver who dies at his own hand behind the wheel of a motor vehicle did not die from an accident as that term is intended to be defined in policies governed by ERISA.

More importantly however, the Petitioner cannot establish any basis for this Court to review a case in which

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[7] The court further noted that "[t]his case falls within the class of cases involving the unintentional taking of poison, cases in which the insured intended to swallow what he did swallow, but was ignorant of the fact that it contained poison. Such cases, without exception, have been held to involve death by accidental means [citation omitted.] 33 F.2d at 855.

the question concerned whether it was an abuse of discretion to deny the Petitioner's claim for benefits when death resulted from drunken driving. Neither the insurance carrier nor the other policy holders ever agreed or intended to pay benefits for people who decide to endanger themselves and innocent third parties by getting behind the wheel of motor vehicles when they are drunk.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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